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No. 1043

In the Supreme Court of the United States

OCTOBER TERM, 1969

PAUL BARSALOUX, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The *per curiam* opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 8, 1969. Mr. Justice Black extended the time for filing a petition for a writ of certiorari to January 17, 1970, and the petition was filed on January 7, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, under the circumstances of the present case, the search of petitioner's suitcase without a warrant was a valid border search.

2. Whether petitioner's conviction for transporting illegally imported marijuana in violation of 21 U.S.C. 176a was proper, where the case was tried by the court and the government relied on direct evidence to show that petitioner knew the marijuana had been imported from Mexico.

3. Whether Fifth Amendment challenges to the remaining counts of the indictment, made for the first time in this Court, require review.

STATUTES INVOLVED

Section 482 of Title 19, U.S.C., provides:

> Any of the officers or persons authorized to board or search vessels may stop, search, and examine, as well without as within their respective districts, any vehicle, beast, or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law, whether by the person in possession or charge, or by, in, or upon such vehicle or beast, or otherwise, and to search any trunk or envelope, wherever found, in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law; and if any such officer or other person so authorized shall find any merchandise on or about any such vehicle, beast, or person, or in any such trunk or envelope, which he shall have reasonable cause to believe is subject to duty, or to have been unlawfully introduced into the United States, whether by the person in possession or charge, or by, in, or upon such vehicle, beast or otherwise, he shall seize and secure the same for trial.

Section 1595(b) of Title 19, U.S.C., provides:

> Any person authorized by this chapter to make searches and seizures, or any person assisting him or acting under his directions, may, if deemed necessary by him or them, enter into or upon or pass through the lands, inclosures, and buildings, other than the dwelling house, of any person whomsoever, in the discharge of his official duties.

STATEMENT

On April 18, 1969, after a non-jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted on all three counts of an indictment which charged him with smuggling marijuana into the United States (count one; 21 U.S.C. 176a), transporting illegally imported marijuana (count two; 21 U.S.C. 176a), and transporting marijuana without having paid a transfer tax (count three; 26 U.S.C. 4744(a)(2)). On June 10, 1969, he was sentenced to six years' imprisonment on each count, to be served concurrently.

At a pretrial hearing on a motion to suppress, petitioner challenged the validity of the seizure of marijuana found in his suitcase. The facts surrounding the seizure are not in dispute. Customs Agent Harvey testified that he had been told by a reliable informant that petitioner was one of a group of men from Chicago who engaged in periodic visits to Laredo, Texas and nearby Mexico, for the purpose of obtaining and smuggling marijuana into the United States. The informant reported petitioner's correct first name, said he used many last names and described his physical

appearance. On August 23, 1968, the informant told Agent Harvey that petitioner and the others [1] were en route to Laredo and gave him a description of the vehicle being used and its Illinois license number (R. 5–7). As a result of this information, petitioner and his companions were under sustained surveillance by customs authorities between August 23 and August 28, 1968 (R. 5–28). Petitioner registered at a Laredo hotel as "Mr. Paul Brender" (R. 8, 19). During the five days of surveillance, he made several trips to Mexico and was seen visiting the residences of known Mexican traffickers in narcotics in a rented car (R. 10, 13, 15, 19–20). He was seen buying plastic bags; a gray suitcase was seen in his car (R. 12, 13). After returning from one of his trips to Mexico, petitioner visited two river border crossings, some miles from Laredo, that were known to be used as smuggling rendezvous points (R. 15–17). When he returned to the United States on August 27, his automobile was searched at the border, but no contraband was found (R. 21).

The next day, August 28, petitioner rented another automobile in Laredo under the name Beeson, which was the name of one of his associates (R. 15, 23). He then revisited the two points on the river where he had previously stopped. At these points, visual sur-

[1] Three of his companions had been arrested in July 1968 for smuggling marijuana into the United States (R. 7, 8, 10). "R." refers to the one volume record on file with the Clerk of this Court.

veillance was lost due to traffic conditions. A few minutes later, however, petitioner returned to Laredo and surveillance was resumed. He was seen to visit the Trans-Texas Airline office, where he left the gray suitcase, which had earlier been seen in his car, for shipment to his Chicago address, under the name Paul Brender (R. 25). After petitioner left the office, Agent Harvey entered and examined the outside of the suitcase. He recognized an odor which emanated from it as that of marijuana. At that time, the agent was alone. He did not know petitioner's whereabouts, nor when the suitcase was scheduled to arrive in Chicago (R. 24, 28–29). Using a screwdriver, he opened the suitcase. It contained 10 pounds of marijuana wrapped in five plastic packages (R. 27). Agent Harvey then radioed news of his discovery to fellow agents, who arrested petitioner in a vehicle north of Laredo (R. 28, 32).

On the basis of this evidence, the trial court denied the motion to suppress (R. 47–56). Petitioner thereafter waived jury trial. At trial, petitioner and his counsel stipulated to the testimony of Agent Harvey and admitted all of the allegations of the indictment, including "guilt to the three counts." Petitioner made no Fifth Amendment claims, but reserved his objection to the introduction of the evidence concerning the contents of the suitcase (R. 36–37). The court found petitioner guilty (R. 39, 57).

ARGUMENT

1. The warrantless search and seizure of the suitcase was a valid exercise of customs authority con-

sistent with the Fourth Amendment's standard of reasonableness.

Congress has long given special authority to customs agents to examine goods in transit in the United States, including "trunks", where there is "reasonable cause to suspect" that the goods have been brought into this country contrary to law (See 19 U.S.C. 482, and 19 U.S.C. 1595(b), *supra* pp. 2–3). This grant of authority stems from the recognition, before the adoption of the Fourth Amendment, that seizure of smuggled goods without warrant was not an unreasonable search and seizure (*Boyd* v. *United States,* 116 U.S. 616, 623), and the fact that speedy official action is needed to prevent the removal of such goods when they are in transit. In the situation where the statutory authority has most frequently been applied—transit by automobile—the reasonableness of permitting a search without a warrant of goods suspected of having been smuggled has long been recognized. See *Carroll* v. *United States,* 267 U.S. 132, 151–152; cf. *Chimel* v. *California,* 395 U.S. 752, 764 n. 9, recognizing the continuing vitality of *Carroll.* That authority was validly exercised in this case.

As we have pointed out in the Statement, the customs agents' general surveillance gave them ample cause to suspect that petitioner was engaged in the marijuana smuggling traffic. The search at issue here occurred only after petitioner had been seen to return to known smuggling points at the Mexican border and then—after he was lost sight of for a few moments in traffic—to deposit a suitcase, which he had earlier been seen to take to the border, with a commercial airline for

transportation to Chicago. In short, the agent who seized the suitcase had reason to believe that he was examining goods in transit which had just been illegally smuggled from Mexico. This was the exercise of valid customs authority. See *Romero* v. *United States,* 318 F. 2d 530 (C.A. 5), certiorari denied, 375 U.S. 946. Cf. *Maguire* v. *United States,* 396 F. 2d 327 (C.A. 9), certiorari denied, 393 U.S. 1099; *United States* v. *Glaziou,* 402 F. 2d 8 (C.A. 2), certiorari denied, 393 U.S. 1121.[2]

Nor, contrary to petitioner's claim, was the search and seizure invalid because opportunity may have existed to obtain a warrant. To begin with, at the time of the seizure Agent Harvey was alone, and knew neither petitioner's whereabouts, nor when the suitcase was scheduled to depart for Chicago (R. 24, 28–29). Had he left to secure a warrant, petitioner might have returned and repossessed the suitcase, or it might have been shipped out, before the agent returned with the warrant. The dispositive factor, in any event, was that the suitcase was reasonably suspected to contain goods which had very recently been smuggled into

[2] Thus, the search of the suitcase was not, as petitioner describes it a "second" search "upon suspicion only some 20 hours after [petitioner] had been thoroughly searched at the border, no contraband found, and [petitioner] permitted to proceed on his way" (Pet. 6). On the contrary, the search of the rented vehicle on August 27, when petitioner returned from Mexico, had no nexus with the search of the suitcase on the following day. On the 28th, petitioner used a different rented vehicle and took a different trip. He did not go into Mexico but, instead, visited border crossing areas, known smuggling points on the American side of the river. It was only after he returned from the river points that he attempted to ship his suitcase, and then under an assumed name.

the country, at a point where customs inspection was unavailable, in a ready state of mobility, and thus subject to non-warrant seizure. No private place, dwelling or store was entered; the goods were placed in a public depot for handling and shipment by a common carrier; and they were seized while they remained in a public place. The minimal invasion of privacy in these circumstances, was precisely analogous to the recognized right to inspect trunks at the border.

Thus, there is no conflict here with *United States* v. *Selby*, 407 F. 2d 241 (C.A. 9) or *Corngold* v. *United States*, 367 F. 2d 1 (C.A. 9). In *Selby*, the court specifically found that the search objected to was *not* a border search, because the defendants' vehicle had previously been searched at the border, however cursorily, and then sent on its way; later, police were instructed to stop it, and searched it again. There was no suggestion that that search involved matter that previously had not been subject to inspection at the border, and so the court held it could not be classed as a customs search. Similarly, in *Corngold* the court found that there was nothing "in the record to suggest that the search of appellant's packages occurred in the course of an entry into this country," 367 F. 2d at 3; but that suggestion is compelling here.

Finally, the only relevance to this case of the Ninth Circuit's decision in *United States* v. *Van Leeuwen*, 414 F. 2d 758, certiorari granted, 396 U.S. 885, is that it shows the basis for fearing that the customs agent could not have detained the suitcase at the airport for the period required to secure a warrant. There, however, the detention was by post office offi-

cials, not customs officials, and, again, the special rules applicable to border searches do not apply. *Van Leeuwen* does not involve the question whether customs officials may seize and inspect in transit a trunk which they have reason to believe was imported without submission to a customs inspection point and contains marihuana.

2. As the court of appeals noted (Pet. App. 3a), consideration of petitioner's Fifth Amendment claims—which he advances here for the first time—would have to start with the issue of waiver. While petitioner's trial was held in advance of this Court's decision in *Leary* v. *United States*, 395 U.S. 6, it was long after the precursors of that decision—*Marchetti, Grosso,* and *Haynes.*[3] This Court excused a failure to claim the privilege in *Grosso* because prior decisions, left untouched until its decision in *Grosso* itself, suggested the futility of such a claim. 390 U.S. at 71. But the *Marchetti-Grosso-Haynes* triad cleared the air, as it were, of the earlier decisions, and hence makes an insistence upon claim of the privilege in subsequent years entirely appropriate.

Moreover, the conviction under count 2, for transportation of illegally imported marihuana, 21 U.S.C. 176a, is plainly sound as against any challenge. The case was tried by the court, and the government did not rely on any presumption of knowledge of illegal importation—the constitutional weak point, *Leary, supra,* 395 U.S. at 30–32; rather, it directly proved petitioner's knowledge of illegal importation, and peti-

[3] *Marchetti* v. *United States*, 390 U.S. 39; *Grosso* v. *United States*, 390 U.S. 62; *Haynes* v. *United States*, 390 U.S. 85.

tioner admitted that he had that knowledge (R. 37). See our memorandum in opposition in *McClain* v. *United States*, No. 1078, this Term.

Since identical concurrent sentences were imposed here for the three offenses charged, and all of the offenses arose from a single course of events—with none supplying unique or aggravating circumstances likely in itself to influence the sentence length—application of the concurrent sentence doctrine as a rule of "judicial convenience" in this case was appropriate (Pet. App. A 3). Therefore, there would be no need to examine counts 1 and 3 even should our waiver argument not be accepted. If the claim was not waived, however, *Leary* makes clear beyond doubt that the conviction under count 3 was invalid, in that situation we would have no objection to the Court's granting certiorari for the limited purpose of vacating petitioner's conviction on that count.[4]

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[4] The conviction under count 1 was valid, for the required invoicing of the marijuana would not have subjected petitioner to any appreciable risk of self-incrimination. Had he declared the drug at the port of entry, it would have been confiscated and therefore he would never have been in possession of it once he cleared Customs and entered the United States. The federal and state marijuana laws apply only to possession of the drug "in" the United States. *Arrizon* v. *United States*, 224 F.Supp. 26, 27 (S.D.Cal.). And, since petitioner could not qualify to be an importer of marijuana, he could not be prosecuted for violation of the registration provisions of the Marijuana Tax Act, 26 U.S.C. 4751–4753. *Leary*, *supra*, 395 U.S. at 24 n. 38.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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